

**§ 779.355 Classification of lumber and building materials sales.**

(a) *General.* In determining, for purposes of the section 13(a)(2) and (4) exemptions, whether 75 percent of the annual dollar volume of the establishment's sales which are not for resale and are recognized as retail in the industry, such sales will be considered to include all sales of lumber and building materials by the establishment which meet all the requirements for such classification as previously explained in this subpart, but will not be considered to include the transactions noted in paragraphs (b) and (c) of this section, which do not meet the statutory tests:

(b) *Transactions not recognized as retail sales.* (See §§ 779.314 through 779.329.) Dollar volume derived from the following is not made from sales or services which are recognized as retail in the industry:

(1) Contracts to build, maintain, or repair buildings or other structures, or sales of services involving performance of typical construction activity or any other work recognized as an activity of a contracting business rather than a function of a retail merchant;

(2) Sales of lumber and building materials in which the seller agrees to install them for the purchaser, where the installation is not limited to services that are merely incidental to the sale and delivery of such materials but includes a substantial amount of activity such as construction work which is not recognized as retail (for example, sale and installation of roofing, siding, or insulation). A sale of such materials which would otherwise be recognized as retail (contracts described in paragraph (b)(1) of this section are outside this category) may be so recognized notwithstanding the installation agreement, however, to the extent that the sales value of the materials is segregated and separately identified in the transaction;

(3) Sales in direct carload shipments; that is, where the materials are shipped direct in carload lots from the dealer's supplier to the dealer's customer;

(4) Sales of specialized goods (some examples are logs, ties, pulpwood, telephone poles, and pilings). Such special-

ized items are of the type which the general consuming public does not ordinarily have occasion to use (cf. § 779.318 and *Mitchell v. Raines*, 238 F. 2d 186), and the sales of such items are not recognized as retail in the industry;

(5) Sales made pursuant to formal bid procedures, such as those utilized by the Federal, State, and local governments and their agencies, involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications.

(c) *Sales for resale.* (See §§ 779.330-779.336.) Examples of sales which cannot be counted toward the required 75 percent because they are for resale include:

(1) Sales of lumber and building materials sold to other dealers for resale in the same form;

(2) Sales to industrial concerns for resale in any altered form or as a part or ingredient of other goods;

(3) Sales to contractors or builders for use in the construction, repair, or maintenance of commercial or industrial structures or any other structures not specifically included in section 3(n) of the Act (*Sucrs. de Mayal v. Mitchell*, 280 F. 2d 477, certiorari denied 364 U.S. 902; and see *Arnold v. Kanowsky*, 361 U.S. 388, 394, footnote 10, and §§ 779.335-779.336);

(4) Transfers of goods by an employer, who is a dealer in lumber and building materials and who also acts in the capacity of a building contractor or speculative builder, from or through his building materials establishment to his building business for the construction maintenance, or repair of commercial property or any other property not excepted in section 3(n) of the Act. (See § 779.336.)

**§ 779.356 Application of exemptions to employees.**

(a) *Employees who may be exempt under sections 13(a)(2) and 13(a)(4).* These exemptions apply on an establishment basis (see §§ 779.302-779.306). Accordingly, where an establishment of a dealer in lumber and building materials qualifies as an exempt retail or service establishment under section 13(a)(2) or as an exempt establishment under section 13(a)(4), as explained in